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Nos. 03-867 and 03-882

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CF INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

THOMSON INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICUS CURIAE

This brief is filed by the American Association of Exporters and Importers ("AAEI") as amicus curiae in support of the petitions for writs of certiorari filed by Thomson Inc. and CF Industries, Inc.[1]

Founded in 1921, AAEI is a national association of over 1,000 U.S. firms that export, import, distribute, and manufacture a broad range of products, including chemicals, electronics, machinery, footwear, automobiles and automobile parts, food, household consumer goods, toys, specialty items, textiles, and apparel. AAEI's membership also includes many organizations serving the international trade community, including customs brokers, freight forwarders, banks, attorneys, insurance firms, and carriers.

AAEI is often called upon by Congressional committees to offer its technical expertise on policy and regulatory matters impacting global commerce. The association and its members have an abiding interest in U.S. laws affecting international trade and their adherence to the Constitution. These cases are significant for AAEI because its membership includes companies that have paid Harbor Maintenance Taxes in connection with imports into the United States and/or domestic shipments within the United States, and that have filed lawsuits challenging the constitutionality of such assessments. Those lawsuits are currently pending in the United States Court of International Trade and will be directly affected by the outcome of the *Thomson* and *CF Industries* cases.

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1. Letters from the Petitioners and the Respondent consenting to the filing of this brief accompany this filing. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Federal Circuit's holding that the Harbor Maintenance Tax ("HMT") as applied to imports and domestic shipments is a user fee rather than a tax, and therefore beyond the scope of the Uniformity Clause requirement that all "Duties, Imposts and Excises shall be uniform throughout the United States," cannot be reconciled with this Court's earlier holding that the HMT is, in fact, a tax rather a user fee. *See United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (holding that the HMT is a "tax" on exports that violates the Export Clause of the Constitution, which states, "No Tax or Duty shall be laid on Articles exported from any State").

In *United States Shoe*, this Court recognized that the flexible user fee analysis applicable to implied constitutional limitations on governmental taxing authority, under which an assessment need only be a "fair approximation" of the use of government-provided services in order to qualify as a user fee, does not govern under the Export Clause, which, by virtue of its *express* prohibition against federal taxation of exports, requires that a valid user fee bear a close relationship to the use of government services. This Court held that the HMT as applied to exports is a prohibited tax rather than a valid user fee because it is assessed as a fixed percentage of the value of the cargo shipped, and "[t]he value of export cargo . . . does not correlate reliably with the federal harbor services used or useable by the exporter." 523 U.S. at 369.

The Federal Circuit misinterpreted *United States Shoe* as limiting a strict user fee standard to the Export Clause and endorsing the more permissive "fair approximation" standard for all other constitutional provisions, including the Uniformity Clause. To the contrary, this Court's analysis of the HMT in *United States Shoe* applies equally to other

express restrictions on the federal government's taxing authority, such as the Uniformity Clause. Therefore, the Court should grant the petitions to clarify that the flexible user fee analysis is inapplicable to such express limitations, and that the HMT is indeed a tax.

As a "tax," the HMT is unconstitutional under the Uniformity Clause. The Uniformity Clause requires that a "tax [must] apply, at the same rate, in all portions of the United States where the subject of the tax is found." *United States v. Ptasynski*, 462 U.S. 74, 84 (1983). The subject of the HMT is port use in the United States, which, in turn, is defined as the loading or unloading of commercial cargo from a vessel at a port. However, a variety of HMT exemptions drawn along geographic lines relieve this commercial activity from the tax. These exemptions apply to: (1) domestic cargo unladen in Alaska or Hawaii; (2) all cargo unladen from vessels that are subject to the Inland Waterway Fuel Tax; and (3) all cargo unladen at ports located in inland waterways or along a portion of the Columbia River. As these exemptions allow port use to escape HMT liability, the HMT is unconstitutional under the Uniformity Clause.

The HMT exemptions for domestic cargo unladen in Alaska or Hawaii also run counter to the Port Preference Clause of the Constitution, which states in pertinent part, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ." The Federal Circuit upheld the HMT because it found that these exemptions were not intended to provide a preference to the ports of Alaska and Hawaii at the expense of other States' ports. However, the Federal Circuit's novel incorporation of a subjective intent test into the Port Preference Clause is inconsistent with this Court's precedents, which confirm that naked preferences of the sort provided for in the HMT statute are strictly prohibited.

This Court should grant the certiorari petitions in order to preserve the integrity of the Port Preference Clause, which was vitiated by the Federal Circuit's decision.

Finally, the Court should grant the petitions given the economic significance of the issues to the U.S. importing community. The HMT is assessed on virtually all waterborne imports into this country, involving approximately $500 billion in imported merchandise and resulting in approximately $500 million in HMT collections each year. Review by this Court is warranted to rectify this enormous, unconstitutional exaction from importers.

ARGUMENT

I. THIS COURT'S CONCLUSION IN *UNITED STATES SHOE* THAT THE HMT IS A "TAX" RATHER THAN A "USER FEE" APPLIES EQUALLY TO THE UNIFORMITY CLAUSE.

The Federal Circuit held that the HMT is a user fee rather than a tax, and therefore not subject to the Uniformity Clause of the Constitution, which mandates that all "Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. *See Thomson multimedia Inc. v. United States* and *CF Industries, Inc. v. United States*, 340 F.3d 1355 (Fed. Cir. 2003) ("*Thomson*"). The Federal Circuit's holding is a striking deviation from this Court's determination in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), that the HMT is a tax rather than a user fee, and thus violative of the Export Clause of the Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

The Federal Circuit interpreted *United States Shoe* as limiting, to the Export Clause, a strict standard for determining whether a particular charge is a user fee rather

than a tax, and endorsing a more permissive standard for making that determination in all other constitutional contexts. *See Thomson*, 340 F.3d at 1361 (characterizing *United States Shoe* as having been based on a "different, more stringent standard specific to the Export Clause," and applying "the more flexible *Massachusetts* test" to the Uniformity Clause challenge here).[2]

In doing so, the Federal Circuit fundamentally misinterpreted this Court's decision in *United States Shoe*. Although *United States Shoe* relied upon an earlier Export Clause decision,[3] and distinguished "decisions involv[ing] constitutional provisions other than the Export Clause" which do not expressly limit governmental taxing authority, *id.* at 368, this Court did not suggest that the *Massachusetts* test applies by default everywhere else in the Constitution. Rather, the Court signaled that the applicability of the *Massachusetts* test turns on whether the constitutional provision at issue expressly limits governmental taxing authority. As explained below, because the Uniformity Clause is such an express limitation, the *Massachusetts* test does not apply.

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2. Under the *Massachusetts* test, which this Court formulated in the context of the doctrine of implied State tax immunity, in order to constitute a user fee, a charge must: (1) not discriminate against a constitutionally protected interest; (2) be based upon a "fair approximation" of use; and (3) not be excessive in relation to the cost to the government of the benefits conferred. *Massachusetts v. United States*, 435 U.S. 444 (1978).

3. The Court cited *Pace v. Burgess*, 92 U.S. 372 (1875), as "[t]he guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context." *United States Shoe*, 523 U.S. at 369. *Pace* did not set forth any particular "test" under the Export Clause. Rather, its general analysis "established that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present" in the case of the HMT. 523 U.S. at 369.

In *United States Shoe*, this Court observed that "the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368. The "other constitutional limitations" which the Court addressed, *i.e.*, the Commerce Clause, the doctrine of implied State tax immunity, and the Takings Clause, lack textually express requirements or, in the case of the Takings Clause, only rarely constrain the federal government's taxing power.[4] Because these clauses therefore impose fewer constraints on taxation than the Export Clause, the "'*text* of [which] . . . *expressly* prohibits Congress from laying any tax or duty on exports,'" *id.* (emphasis added) (quoting *IBM*, 517 U.S. at 852), this Court held that the flexible user fee analysis applicable to those constitutional provisions does not govern under the Export Clause. *Id.* at 368-69.

The Uniformity Clause, which mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States," is, like the Export Clause, a clear textual command that directly restricts the general grant of the taxing power to Congress. Indeed, Justice Story, in his *Commentaries on the Constitution of the United States*, noted that without the

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4. As this Court has noted, the Commerce Clause "does not expressly prohibit the States from doing anything"; rather, the "negative implications of the Clause . . . prevent certain state taxation even when Congress has failed to legislate." *United States v. International Bus. Mach. Corp.*, 517 U.S. 843, 851 n.2 (1996) ("*IBM*"). The Takings Clause, though textually express in its requirement that "nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V, only rarely impacts the taxing power of the federal government. *See, e.g., 287 Corporate Center Assocs. v. Township of Bridgewater*, 101 F.3d 320, 324 n.5 (3d Cir. 1996) ("levying taxes does not rise to the level of a Fifth Amendment taking unless it was so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property. . . .'") (quoting *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916)).

Uniformity Clause, the "value of most of the *other restrictive clauses* in the constitution" would have been "demolish[ed]." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 954, at 428-29 (Boston, Hilliard, Gray and Company 1833) (emphasis added). Recently, one commentator has observed that given their textual similarities, the Uniformity Clause is as strong a limitation on the taxing power as the Export Clause. *See* Eric M. Jensen, *The Export Clause*, 6 Fla. Tax Rev. 1, 72-73 (2003) (comparing the unqualified prohibition of the Export Clause to the Uniformity Clause, which "absolutely prohibits duties, imposts and excises that aren't uniform.").

Given the textual similarities of the Export Clause and the Uniformity Clause, *United States Shoe*'s rejection of the *Massachusetts* "fair approximation" test applies equally to the cases at bar. Thus, the same close relationship between the HMT and the government's harbor maintenance services that was required, but lacking, under the Export Clause in *United States Shoe* is required, but lacking, under the Uniformity Clause. Therefore, *United States Shoe's* holding that the HMT is a "tax" governs the cases at bar.

Just as the HMT imposed on exports was "determined entirely on an ad valorem basis" rather than based on factors reflecting the actual extent and manner of port use, "such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging," *United States Shoe*, 523 U.S. at 369, the HMT is imposed ad valorem on imports and domestic shipments. And, just as "[t]he value of the export cargo . . . does not correlate reliably with the federal harbor services used or useable by the exporter," *id.*, the value of imported or domestically-shipped cargo does not correlate reliably with the cost or value of the harbor services used or useable by companies that import or ship domestically. Notably, the Federal Circuit did not suggest that the harbor services used

by importers or domestic shippers differ from the harbor services used by exporters. Therefore, this Court's conclusion in *United States Shoe* that the HMT does not "fairly match the exporters' use of port services and facilities," 523 U.S. at 370, necessarily controls the cases at bar.

United States Shoe reflects this Court's recognition that where the Framers included an express restriction on the federal government's taxing power, that command must be interpreted broadly to ensure that it is given full effect. Thus, given the express restriction on taxation in the Export Clause, this Court was careful "'to guard against . . . the imposition of a [tax] under the pretext of fixing a fee'. . . ." *United States Shoe*, 523 U.S. at 370 (quoting *Pace*, 92 U.S. at 376). Given the similar textual command in the Uniformity Clause that "all Duties, Imposts and Excises shall be uniform throughout the United States," this Court should grant the petitions for certiorari to likewise guard against the federal government's imposition of a *non-uniform* tax under the pretext of fixing a fee.[5]

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5. Even if the Federal Circuit was correct in examining the HMT as applied to imports and domestic shipments under the *Massachusetts* "fair approximation" test, its conclusion that the HMT is a user fee cannot be squared with *United States Shoe*, in which this Court observed that the HMT was not even a "fair approximation of services, facilities, or benefits furnished to the exporters." 523 U.S. at 363. In the export context, the Federal Circuit itself found that "the amount of HMT has *no relationship* to the size or weight of the vessel or the necessary depth of the port required by the vessel." *United States Shoe Corporation v. United States*, 114 F.3d 1564, 1572 (Fed. Cir. 1997) (emphasis added). The calculation of the HMT and the nature of harbor use or services in the import and domestic shipment contexts is no different from the export context.

II. THE HMT VIOLATES THE UNIFORMITY CLAUSE.

The Uniformity Clause mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The HMT statute violates the Uniformity Clause by creating a series of exemptions pertaining to goods unladen at ports in Hawaii, Alaska, the inland waterway system, and a portion of the Columbia River.

In *United States v. Ptasynski*, 462 U.S. 74 (1983), this Court reiterated the well-settled rule that under the Uniformity Clause, a "tax [must] apply, at the same rate, in all portions of the United States where the subject of the tax is found." *Id.* at 84; *see also Knowlton v. Moore*, 178 U.S. 41, 84 (1900) ("[W]herever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."). The HMT statute violates the rule of uniformity because it imposes a tax on commercial activity involving port use, but creates exemptions based on the geographic location where that activity occurs, and on other extraneous considerations.

However, the trial court in these proceedings, the United States Court of International Trade ("CIT"), ruled that it would "invalidate the HMT under the Uniformity Clause only where it finds that Congress' purpose [in creating the exemptions] was to promote regional favoritism or discrimination." *See Thomson multimedia Inc. v. United States*, 219 F. Supp. 2d 1322, 1326 (Ct. Int'l Trade 2002). By substituting a test of subjective intent for the inquiry called for under this Court's precedents, the CIT eviscerated the Uniformity Clause. This Court should therefore grant the certiorari petitions to further delineate the scope of the clause.[6]

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6. The Court should do so even though the Federal Circuit did not address the Uniformity Clause issue given its determination that the HMT is a user fee that is not subject to the clause. For example, in *Carlson v. Green*, 446 U.S. 14 (1980), this Court considered a

(Cont'd)

The HMT statute "impose[s] a tax on any port use." 26 U.S.C. § 4461(a). Thus, the subject of the HMT is port use, which, in turn, is defined as the loading or unloading of commercial cargo from a vessel at a port. 26 U.S.C.

(Cont'd)
question that was not even presented in the district court because "the interests of judicial administration will be served by addressing the issue on its merits." *Id.* at 17 n.2. The issue in *Carlson* was "squarely presented [to this Court] and fully briefed," and was "an important recurring issue [that was] properly raised in another petition for certiorari being held pending disposition of this case." *Id.* Review of the Uniformity Clause issue is similarly warranted here, where: (i) more than 1,000 cases challenging the HMT as applied to imports or domestic shipments are being held in abeyance by the CIT pending disposition of the instant certiorari petitions; (ii) the issue was fully briefed in both the Federal Circuit and the CIT in *Thomson* and *CF Industries*; and (iii) the CIT issued a detailed decision in *Thomson* (the reasoning of which was incorporated by the CIT in its *CF Industries* decision) upholding the HMT under the Uniformity Clause.

Furthermore, as is evident from the discussion *infra*, a decision by this Court that the HMT exemptions for Alaska and Hawaii violate the Port Preference Clause would also implicate the Uniformity Clause, as it would require invalidation of the HMT on all domestic shipments and thereby result in complete HMT-exemption for the many ports that accommodate domestic shipments only, despite continued port use at those ports. In other words, the Court cannot strike down the HMT on domestic shipments and leave the HMT on imports standing alone; this circumstance would violate the Uniformity Clause because port use — the lading or unlading of commercial cargo — would continue at a number of ports that accommodate domestic shipments only, but such port use would not be subject to the HMT. Compare 19 C.F.R. § 24.24, designating all ports subject to HMT, with 19 C.F.R. § 101.3, listing Customs ports where imported merchandise may be unladen (the former lists more ports because it includes ports that service domestic shipments but not imports). Given the importance of these issues, this Court should grant certiorari on the Uniformity Clause issue and decide the entire case on the merits.

§ 4462(a)(1).[7] However, domestic port use in Hawaii and Alaska is relieved from the tax by means of a "Special rule for Alaska, Hawaii, and possessions," which reads in pertinent part: "No tax shall be imposed under section 4461(a) with respect to [domestic shipments of cargo unloaded in Alaska or Hawaii]." 26 U.S.C. § 4462(b). Thus, the statute unconstitutionally provides that the tax shall not apply despite the existence of the subject of the tax in Hawaii and Alaska.

Similarly, 26 U.S.C. § 4462(c) provides that no tax will be imposed on the unlading of any cargo if, at some point along its itinerary, the vessel becomes subject to the IWFT imposed under 26 U.S.C. § 4042.[8] In other words, there is no HMT liability whenever a cargo vessel's itinerary touches upon some IWFT river. Here, the HMT statute unconstitutionally provides that the tax shall not apply despite the existence of its subject, due solely to an independent taxable event that arises under an entirely different statute. The HMT creates similar geographic exemptions for ports located along inland waterways[9] and a portion of the Columbia River.[10]

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7. As enacted, the HMT statute provided that cargo destined for export from the United States would be taxed upon lading, while all other cargo would be taxed upon unlading. *See* 26 U.S.C. § 4461(c)(2). As this Court's decision in *United States Shoe* invalidated the HMT on exports, the tax is now assessed solely upon the unlading of cargo.

8. The IWFT, imposed under 26 U.S.C. § 4042(b)(2)(A), is assessed at the modest rate of 20 cents per gallon of fuel consumed on the waterway.

9. *See* 26 U.S.C. § 4462(a)(2)(A)(i) (defining "port" as "any channel or harbor . . . in the United States which is not an inland waterway. . . ."). There are 27 inland waterways in the United States. *See* 33 U.S.C. § 1804.

10. *See* 26 U.S.C. § 4462(a)(2)(C) (defining "port" to include the channels of the Columbia River in Oregon and Washington only

(Cont'd)

All of these exemptions operate to remove actual port use from the purview of the tax, even though the ports involved require and receive harbor maintenance services funded by revenue generated from HMT assessments. Under these circumstances, none of the exemptions can be squared with this Court's Uniformity Clause precedents.

Stated another way, unlike this Court's decision in the *Head Money Cases*, 112 U.S. 580, 595 (1884), the "evil to be remedied by [the tax] legislation" — navigational impediments in this case — exists at the exempted ports. *See id.* at 594-95 (per capita excise tax on immigrants assessed at water ports but not inland ports did not violate the Uniformity Clause because there was no immigration at inland ports); *see also Ptasynski*, 462 U.S. at 82 (explaining that in *Head Money Cases*, "[t]he tax applied to all ports alike. . . .").[11]

The *Ptasynski* Court also observed that if Congress "frame[s] a tax in geographic terms," courts must "examine the classification closely to see if there is actual geographic discrimination." 462 U.S. at 85. Here, the HMT exemptions create actual geographic discrimination among ports in violation of the Uniformity Clause by encouraging vessels to unlade at HMT-exempt ports, as ports that are subject to the HMT (and which subsidize harbor maintenance at exempt

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up to the downstream side of Bonneville lock and dam, which is located roughly at Columbia River Mile 144). This special rule creates a unique tax immunity covering approximately 47 miles of the Columbia River where neither the HMT nor the IWFT applies. *See* 33 U.S.C. § 1804(8) (providing that the IWFT shall apply at Columbia River Mile 191.5 and points upstream).

11. In *Ptasynski*, the Court also found no Uniformity Clause violation because the exemptions were not drawn along state political lines, a clear distinction with the HMT exemptions for Alaska and Hawaii. *See* 462 U.S. at 78.

ports) are less attractive destinations for commercial cargo. The Port of Bienville in Mississippi illustrates the advantage for inland waterway ports created by the HMT. Bienville is a customs port of entry, situated on the Pearl River a few miles north of the Gulf of Mexico. Because the Pearl River is a designated inland waterway, imported merchandise that is entered at Bienville (or domestic cargo unladen at Bienville) is not subject to the HMT. *See* 19 C.F.R. § 24.24.

Furthermore, the exemption for cargo on vessels subject to the IWFT creates unconstitutional competitive advantages for ports in close proximity to an inland waterway. Shippers of domestic or imported cargo can plan their itineraries so that their vessels traverse a nearby inland waterway before or after unlading, thus incurring a negligible IWFT expense, which negates HMT liability.[12]

Accordingly, the HMT exemptions violate the Uniformity Clause by allowing a variety of port use to escape the tax, and by producing competitive advantages and disadvantages among ports that give rise to actual geographic discrimination.

III. THE HMT VIOLATES THE PORT PREFERENCE CLAUSE.

The Port Preference Clause provides in pertinent part, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ." U.S. Const. art. I, § 9, cl. 6. Had the Federal Circuit abided by this Court's Port Preference Clause precedents, it would have found the preferences contained in 26 U.S.C. § 4462(b), which establish HMT exemptions in

12. In this regard, the Court should take particular note of the port shopping incentives that emanate from the designation of the 1,192 mile Atlantic Intracoastal Waterway, and the 1,134.5 mile Gulf Intracoastal Waterway, as inland waterways. *See* 33 U.S.C. §§ 1804(6) and 1804(11), respectively.

favor of ports in Hawaii and Alaska, unconstitutional. Accordingly, the Court should grant the certiorari petitions in order to preserve the integrity of the Port Preference Clause, which was vitiated by the Federal Circuit's decision.

As the Federal Circuit acknowledged, HMT assessments do not affect each State's commerce in the same way: "[T]he statute explicitly exempts from the HMT domestic cargo (excluding crude oil) either unloaded in Hawaii, Alaska, or U.S. possessions or unloaded in the continental United States and shipped from Alaska, Hawaii, or a U.S. possession. [26 U.S.C.] § 4462(b)." *Thomson*, 340 F.3d at 1357; *see also id.* at 1366 ("It is true that domestic shipments — except for crude oil shipments out of Alaska — that arrive in the ports of [Alaska or Hawaii] will not be subject to HMT liability.").

Despite these naked preferences, the Federal Circuit upheld the HMT because

> the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions.

Thomson, 340 F.3d at 1366. Thus, the Federal Circuit looked to the *subjective intent* of Congress in fashioning port preferences and concluded that the clause "prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports." *Id.* at 1365. The Federal Circuit's novel interpretation of the Port Preference Clause — the court itself conceded that no case directly supports such an approach (*see id.*) — is inconsistent with this Court's precedents and therefore should be overruled.

In *Knowlton v. Moore*, 178 U.S. 41 (1900), this Court ruled that "[t]he substantial effect of the [Port Preference Clause] . . . was to require that all regulations of commerce or of revenue affecting commerce through the ports of the States should be the same in all ports." *Id.* at 104 (emphasis omitted). Although the Federal Circuit acknowledged that the HMT is assessed differently with respect to ports in Alaska and Hawaii, it failed to cite, let alone distinguish, *Knowlton*. *See Thomson*, 340 F.3d at 1357, 1366. Had the Federal Circuit followed *Knowlton*, it would have been constrained to declare the HMT unconstitutional.

In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), this Court explained the direct, objective proscription contained in the Port Preference Clause regarding preferences in the form of "privileges or immunities" granted by Congress:

> [T]hese privileges and immunities, whatever they may be in the judgment of congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by congress to this effect. . . .

59 U.S. at 435. *Wheeling's* ruling that "privileges or immunities" granted by Congress — which terms surely encompass the exemptions at issue here — "shall be common and equal in all the ports of the several States," *id.*, categorically bars the Federal Circuit's position that subjective congressional intent underpins Port Preference Clause analysis.

Contrary to the Federal Circuit's statement that this Court's precedents "do not support the proposition that a statute with explicit exemptions of states to *prevent* disparate effects violates the [Port Preference] Clause," *Thomson*, 340 F.3d at 1364-65, *Wheeling* directs a court to determine simply whether Congress has enacted "some positive legislation" that provides a "direct privilege or preference" for the ports of any particular State. If such an assessment does not apply "common[ly] and equal[ly]" in the ports of each State, it violates the Port Preference Clause. *Wheeling*, 59 U.S. at 435. As the Federal Circuit correctly recognized that HMT assessments do not apply commonly and equally to port use in Alaska and Hawaii, *Wheeling* and *Knowlton* require reversal of its decision.

Moreover, by reading the element of subjective intent into the Port Preference Clause, the Federal Circuit transgressed the inveterate canon of constitutional construction that courts should give effect to the plain meaning of a constitutional prohibition unless doing so would produce an absurd result that is inconsistent with the spirit of the Constitution. As Chief Justice Marshall explained:

> It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. *The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.*

Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644-45 (1819) (emphasis added).

Thus, even if the Framers of the Port Preference Clause did not contemplate the type of preferences at issue here, the HMT exemptions involving Alaska and Hawaii nevertheless create "preferences" under the plain language of the clause. Moreover, no credible argument can be made that declaring the HMT unconstitutional under the Port Preference Clause would produce an absurd result repugnant to the Constitution. As the Federal Circuit's decision conflicts with the canon of constitutional interpretation announced in *Woodward*, it should be reviewed by this Court.

IV. THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE TO THE IMPORTING COMMUNITY.

In addition to their significance from a constitutional standpoint, the issues presented are of great economic importance to the United States importing community. Virtually all waterborne import commerce, entering the United States through over 190 ports located in more than 30 States, is subject to the HMT. *See* 19 C.F.R. § 24.24. The HMT applies without regard to the type of product imported or whether the goods are subject to customs duties.

The ad valorem HMT imposes a particular burden on imports, as "[k]ey imports tend to consist of higher value commodities (e.g., electronics, automobiles, etc.). . . ." Department of the Army, Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999, at 13 (Feb. 2001). Overall, as reported by the Department of Transportation Maritime Administration, the value of waterborne imports in 2001 (the latest year for which statistics are available) exceeded $523 billion[13] and approximately $500 million in HMT is collected from importers each year. The fiscal importance of the issues

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13. *See* U.S. Imports by U.S. Customs District and Port – 2001, *at* http://www.marad.dot.gov/statistics/usfwts/imp2001.htm. (last updated April 23, 2002).

presented in these cases warrants issuance of the writs of certiorari. *See United States v. Hill*, 506 U.S. 546, 549 (1993).

CONCLUSION

For the foregoing reasons, amicus curiae American Association of Exporters and Importers respectfully urges this Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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